Supreme Court, U.S.
FILED
JAN 6 - 2004
OFFICE OF THE CLERK

(2) (2)

No. 03-604 AND No. 03-605

IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,
v.
CATHERINE INGLE,
Respondent.

CIRCUIT CITY STORES, INC.,
Petitioner,
v.
PAUL MANTOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN REPLY TO OPPOSITIONS TO PETITIONS FOR WRITS OF CERTIORARI

WALTER DELLINGER
PAMELA HARRIS
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5300

W. STEPHEN CANNON
TERI C. MILES
CIRCUIT CITY STORES, INC.
9954 Mayland Dr.
Richmond, VA 23233
(804) 967-2915

REX DARRELL BERRY
LIVINGSTON & MATTESICH
1201 K Street, Suite 1100
Sacramento, CA 95814
(916) 442-1111 *(Counsel of Record)*
Attorneys for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

BRIEF IN REPLY TO OPPOSITIONS TO PETITIONS FOR WRITS OF CERTIORARI 1

I. A CONFLICT EXISTS AMONG THE LOWER COURTS ON THE SCOPE OF FAA PREEMPTION 2

II. THE DECISION BELOW TURNS ON A PRESUMPTION AGAINST ENFORCEMENT OF EMPLOYMENT ARBITRATION AGREEMENTS THAT IS ARBITRATION-SPECIFIC ON ITS FACE 2

CONCLUSION 4

TABLE OF AUTHORITIES

Page(s)

CASES

Armendariz v. Found. Health Psychare Servs.,
6 P.3d 669 (Cal. 2000) 2

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) 3

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 1

BRIEF IN REPLY TO OPPOSITIONS TO PETITIONS FOR WRITS OF CERTIORARI

Respondents' opposition briefs[1] only confirm that certiorari should be granted in these cases. The question presented is not, as respondents suggest, Ingle BIO ("BIO") at 11, one of California law. Rather, it is a critical question of *federal* law: whether the Federal Arbitration Act ("FAA") preempts the arbitration-specific application of state unconscionability doctrine to invalidate arbitration agreements. The lower courts are divided on that question, and nothing in respondents' briefs shows otherwise. Nor can respondents rebut the fact that the decision below turns critically on a presumption against enforcement of mandatory employment arbitration agreements.

Instead, respondents argue that selective application of state-law rules to void employment arbitration agreements is justified by the inequality of bargaining power inherent in the employment relationship. BIO at 11-13, 15-17. This Court, of course, has rejected just such arguments. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); Ingle Pet. ("Pet.") at 20-24. In any event, respondents' merits argument is not a reason to deny certiorari. If there is any genuine question as to whether state-law rules may be applied selectively to invalidate employment arbitration agreements, then the Court should grant certiorari to reaffirm *Gilmer* and clarify that the FAA preempts arbitration-specific application of a state's unconscionability doctrine.

---

[1] The petitions in *Circuit City Stores, Inc. v. Ingle* (No. 03-604) and *Circuit City Stores, Inc. v. Mantor* (No. 03-605) have been consolidated. For convenience, petitioner has filed one reply brief in response to both briefs in opposition to certiorari, and refers to respondents Ingle and Mantor jointly as "respondents."

I. A CONFLICT EXISTS AMONG THE LOWER COURTS ON THE SCOPE OF FAA PREEMPTION.

Though respondents attempt to rebut petitioner's showing of a stark conflict among the lower courts on the question presented, they are entirely unsuccessful. This is not a case, as respondents would have it, in which different state laws lead to different results. BIO at 11. Rather, the courts are divided on the federal-law question of when the FAA preempts the application of state rules to invalidate arbitration agreements.

The Ninth Circuit below, like the Second Circuit and the California Supreme Court, asks only whether the state-law rule may be classified on its face as a rule of general application, such as "unconscionability." *See* Pet. at 13-14. But any fair reading of the decisions of the First and Third Circuits and the Alabama Supreme Court shows that this is just the *beginning* of the FAA preemption inquiry in those jurisdictions. A court must then ask a second question: Is the state-law rule of general applicability being used in a manner that singles out, or is specific to, the arbitration context? If so, that selective application is preempted by the FAA. *See* Pet. at 14-16. Even the lower courts themselves have begun to recognize the conflict among them. *See Armendariz v. Found. Health Psychare Servs.*, 6 P.3d 669, 692 (Cal. 2000) (noting conflict with Alabama Supreme Court). Respondents' arguments about state law are irrelevant, and do nothing to harmonize the conflicting cases.

II. THE DECISION BELOW TURNS ON A PRESUMPTION AGAINST ENFORCEMENT OF EMPLOYMENT ARBITRATION AGREEMENTS THAT IS ARBITRATION-SPECIFIC ON ITS FACE.

Respondents do not dispute that the decision below invalidates petitioner's arbitration agreement because, in the view of the Ninth Circuit, it is insufficiently "bilateral." *See*

Pet. at 9-10 (describing holding below). As petitioner has shown already, that holding rests on an entirely new presumption that all mandatory arbitration contracts in the employment context – regardless of their express terms – are impermissibly one-sided and hence unenforceable. Even an agreement that *by its own terms* binds both employers and employees is presumptively unenforceable. According to the Ninth Circuit, one must presume that such an agreement will not operate bilaterally in practice because employees have less bargaining power and more claims to arbitrate than their employers. Pet. at 8-9, 17-18; Pet. App. 13a. In short, the decision below turns critically on a presumption against enforcement of employment arbitration agreements that by its very terms is arbitration-specific.

Respondents do not (and cannot) dispute this plain reading of the opinion below.[2] Instead, they attempt to justify the Ninth Circuit's arbitration-specific presumption of invalidity on the merits, by resuscitating the "inequality of bargaining power" argument first rejected by this Court more than a decade ago in *Gilmer* and again rejected in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). In both *Gilmer* and *Adams*, this Court held squarely that concerns about inequality of bargaining power and fairness to employees cannot justify a refusal to enforce mandatory employment arbitration agreements, and that rulings to the contrary are inconsistent with the pro-arbitration federal policy reflected in the FAA. *See* Pet. at 20-21. Respondents' merits arguments, like the decision below, cannot be reconciled with this Court's precedent. If there were any doubt on that score – which there is not – that would not be a reason for denying certiorari. On the contrary, such "doubt" would only con-

---

[2] Respondents do argue that the Ninth Circuit's new presumption of invalidity applies only to "mandatory" employment arbitration agreements. BIO at 16. Both the petitions here deal with just such "mandatory" agreements, so that the Ninth Circuit's presumption indisputably applies and respondents' arguments are beside the point.

firm the need for prompt review by this Court so as to put to rest any lingering questions about the scope and vitality of its holdings in *Gilmer* and *Adams*.

CONCLUSION

This Court should resolve the conflict among the federal circuits and state supreme courts on the important issue of the enforcement of employment arbitration agreements pursuant to the FAA. Respondents have offered no compelling argument against this Court's consideration and resolution of that dispute. By granting certiorari, this Court can ensure that lower courts will not use state-law unconscionability doctrine to contravene this Court's precedents and the pro-arbitration public policy articulated in the FAA.

Respectfully submitted,

WALTER DELLINGER
PAMELA HARRIS
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5300

W. STEPHEN CANNON
TERI C. MILES
CIRCUIT CITY STORES, INC.
9954 Mayland Dr.
Richmond, VA 23233
(804) 967-2915

REX DARRELL BERRY
(COUNSEL OF RECORD)
LIVINGSTON & MATTESICH
1201 K Street, Suite 1100
Sacramento, CA 95814
(916) 442-1111

Attorneys for Petitioner

January 6, 2004